

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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In the Matter of:

Amendment of Part 74 of the Commission's
 Rules with Regard to the Instructional
 Television Fixed Service

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MM Docket No. 93-24

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: The Commission

JOINT REPLY COMMENTS OF EDUCATIONAL PARTIES

American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Alliance for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and the University System of the Ana G. Mendez Educational Foundation ("Educational Parties"), by their attorneys, hereby reply to comments submitted by other parties in response to the Notice of Proposed Rule Making in MM Docket No. 93-24, FCC 93-90 (released February 25, 1993).

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The comments in this proceeding show that the FCC needs to take action to correct the procedural morass that has developed with respect to ITFS processing. However, the underlying problem is not so much the FCC's procedures for accepting applications, but its tolerance of abusive ITFS filings sponsored by speculators, and the lack of resources devoted to processing applications for facilities that are critical to achieving educational and pro-competitive goals. The comments also show that, while the window filing procedure could assist to some degree in limiting abuse of the Commission's processes, it has its own peculiar set of problems which require adjustments or enhancements if the procedure is to be adopted at all. Finally, the comments suggest that there is common ground between educators and the wireless cable industry on the issues in this proceeding. These areas of agreement should form the basis of any changes adopted by the Commission.

The Problem

It is exceedingly significant that wireless cable commentators, including wireless cable's own industry association, lay much of the blame for the current ITFS processing mess at the feet of certain wireless cable sponsors of ITFS applicants. These entities (whose identities apparently are commonly known) are variously termed warehousers, speculators and green mailers, and are regarded by the wireless cable industry itself as abusers of the Commission's processes. Their modus operandi is to identify geographic areas of apparent interest to legitimate wireless cable developers, to find small, unrepresented educational entities to serve as unwitting pawns, and to litter

the landscape with obviously deficient ITFS applications that, due to the FCC's

The Window Procedure

The comments are split on the advisability of adopting a window procedure. Several commentors -- WJB, ITFS Association and Paul Jackson Enterprises -- oppose a window procedure and urge retention of the A/B cutoff approach, perhaps with some modifications. Only one party -- Ruralvision South -- appears to embrace the window procedure outright, and the clear association of that entity with the abuse that underlies the current problem should give the Commission pause. The Educational Parties and WCA point out both benefits and drawbacks of a window procedure, and urge that if it is adopted, it should be refined so as to enhance the benefits and ameliorate the problems.

For example, in its comments, WCA urges that windows must be opened "as often as possible." WCA recognizes that the window procedure will not serve the public interest if windows open so infrequently that ITFS and wireless cable entities lose flexibility to respond to developing needs. The Educational Parties believe their suggested solution -- fixed windows at least twice a year and an exemption for major changes^{1/} -- would satisfy WCA's concerns in this respect.

1/ Several parties pointed out that the FCC's current practice of delaying A cutoff lists for many months after applications are filed contributes to the problem of abusive filings. Therefore, for major changes, the FCC should endeavor to place such applications on cutoff at the earliest opportunity.

WCA also suggests that the FCC adopt a procedure providing for expedited processing of certain ITFS applications where the applicant is willing to commit, and would be required, to order equipment within 14 days of grant and complete construction within six months. Although such a procedure would impose very strict requirements for ITFS parties proceeding without a wireless cable lease, the Educational Parties would support it so long as (1) it applies to ITFS applicants not backed by wireless cable operators as well as those with appropriate wireless cable backing;^{2/} (2) where an ITFS operator purchasing its own equipment is required to use formal bidding procedures, it would only be required to issue an RFP, as opposed to actually placing an order, within the required time period; (3) the RFP/order deadline would be 21 days rather than 14 days, thus recognizing institutional needs; (4) the RFP/order deadline should run from the public notice of grant rather than the date of grant itself; and (5) the procedure does not mean that processing is halted on all other applications. With respect to the latter point, the FCC might want to experiment with the expedited action procedure for a short time to ensure that it in fact does not result in so many "expedited" applications that processing is halted on all other applications.

^{2/} WCA's proposal requires that, where there is a lease, the wireless cable operator should show that it has secured access to licensed MDS and ITFS stations, cutoff MDS applications not mutually exclusive with other timely filed applications, and/or proposed ITFS stations totalling at least 12 channels in the market, including at least four MDS channels. The Educational Parties concur with this limitation.

WCA further suggests that the FCC, if it adopts a window procedure, should prohibit amendments filed after the close of a window that would cure clearly defective ITFS eligibility showings, improve comparative standing, or request (for the first time) waivers that were necessary when the application was filed. This is tough medicine, as it could conceivably result in the dismissal of legitimate ITFS applications, particularly those of educators scrambling to file in a window and/or not represented by experienced counsel. Nevertheless, the Educational Parties believe that strong medicine is called for to cure the current sickness. They support more strict application requirements so long as these requirements are not interpreted as a "letter perfect" standard. Applicants should be free to modify, enhance, correct or supplement their filings after the window closes so long as (1) their basic eligibility was in fact shown in the original filing; (2) they do not receive any comparative credit for amendments; and (3) they have previously requested such waivers as are necessary for a grantable application.

The Educational Parties suggested that the FCC consider a limit (of five) on the number of applicants that could be filed in any window by any non-local ITFS applicant. After reviewing the comments, which stressed the problem of abusive filings backed by particular wireless cable lessees, the Educational Parties believe that there should also be a limit on the number of ITFS applications that can be backed by any

given wireless cable entity in any window.^{3/} On the theory that no wireless cable entity can appropriately develop proposals for more than five markets at any given time, and that, at most, a wireless cable entity could sponsor five applications per market, the Educational Parties suggest a limit of 25 applications per window backed by any given wireless cable entity.

Common Ground

The comments filed in this proceeding show that both ITFS and wireless cable parties are concerned about the FCC's apparent inability to keep up with ITFS processing. There appears to be agreement that the FCC must toughen its stance on abusive applications, which are responsible for much of the processing problem. There is also agreement that, if the FCC adopts a window filing procedure, the procedure should include frequent filing windows, an exemption for major changes, a procedure for expediting the processing of certain applications, a limit on the number of applications filed in any window by a given party, and more strict basic, financial and comparative filing requirements.

The FCC should review the comments and reply comments for common views on these issues. These common views should form the basis of any changes to the rules.

^{3/} For this purpose, a wireless cable entity should include any entity with direct or indirect common ownership or control. As part of the window filing procedure, the FCC should require wireless cable sponsors to file with their sponsored ITFS applications an exhibit detailing the persons having any direct or indirect interest in the wireless cable sponsor, including any interest as owner, officer or director.

Respectfully submitted,

AMERICAN COUNCIL ON EDUCATION

**AMERICAN ASSOCIATION OF
COMMUNITY COLLEGES**

**ARIZONA BOARD OF REGENTS FOR
BENEFIT OF THE UNIVERSITY OF
ARIZONA**

ALLIANCE FOR HIGHER EDUCATION

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